

**VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF PORTSMOUTH**

**REPORT OF SPECIAL GRAND JURY ON THE CIRCUMSTANCES SURROUNDING  
THE EMPLOYMENT AND RESIGNATION/LEAVE OF FORMER FIRE CHIEF  
DONALD HORTON**

**AUTHORITY OF THE SPECIAL GRAND JURY**

By Order entered by the Circuit Court of the City of Portsmouth, Virginia on August 29, 2012, a Special Grand Jury was impaneled pursuant to §19.2-206(A)(iii) of the Code of Virginia, 1950, as amended to investigate and report to the Court on any condition that involves or tends to promote criminal activity as it pertains to the employment and resignation/leave of former Fire Chief Donald Horton during the period of July through October, 2012 as provided in §19.2-191(2) of the Code.

By Order entered October 31, 2012, the Court appointed Lieutenant Larry Jacobs of the Portsmouth Police Department to assist the Special Grand Jury in its investigation, and Deputy Commonwealth's Attorney Mary Harris was designated as Grand Jury Coordinator and administrative assistant to the Special Grand Jury.

By Order entered November 21, 2012, the Court appointed Alan Ball as Special Investigator to provide investigative services to the Special Grand Jury. Pursuant to §19.2-206 of the Code of Virginia, 1950, as amended and the Orders of this Court, the Special Grand Jury conducted an investigation of the matters referred to it, and files this report as required under §19.2-213 of the Code of Virginia, 1950, as amended.

**SUMMARY OF PROCEEDINGS**

The Special Grand Jury convened on this matter on April 9, 2013 and April 30, 2013. In addition to hearing testimony under oath, reviewing exhibits, reviewing statutes and City policies, and participating in deliberations, individual members devoted hours to the review of

documents obtained during the course of the investigation and transcripts of testimony. Special Investigator Alan Ball interviewed a number of people believed to have potentially relevant information and reported his findings to the panel. Documents were reviewed for relevance by the Special Investigator and Commonwealth's Attorney and were considered by the Special Grand Jury as necessary.

### **BACKGROUND**

Donald Horton was hired as the Fire Chief for the City of Portsmouth on April 27, 2009. He left on July 23, 2012 and conflicting reports and documentation indicated that he had both resigned and taken sick or Family Medical Leave Act (FMLA) leave. As he remained on the payroll, questions arose as to whether he should be in a paid status given the resignation. Horton subsequently returned to work, but in the position of Deputy of Emergency Management rather than Fire Chief – creating more questions. Members of City Council pressed for answers from then City Manager Kenneth Chandler. Not satisfied with his response and amid widespread speculation, City Council asked for an investigation by the Commonwealth's Attorney, who requested the appointment of this Special Grand Jury and the appointment of an Investigator to gather the facts and report their findings and recommendations.

### **APPLICABLE LAWS AND CITY POLICIES**

#### **FEDERAL LAW**

The Family and Medical Leave Act, 29 USCS 2601 et. al. provides in pertinent part as follows:

Sec. 2601 Findings and purposes

(b) Purposes. It is the purpose of this Act—

- (1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
- (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;
- (3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

#### Sec. 2611 Definitions

##### (2) Eligible employee.

(A) In general. The term "eligible employee" means an employee who has been employed—

- (i) for at least 12 months by the employer with respect to whom leave is requested under section 102 (29 USCS 2612); and
- (ii) for at least 1250 hours of service with such employer during the previous 12 month period.

(11) Serious health condition. The term "serious health condition" means an illness, injury, impairment or physical or mental condition that involves—

- (A) inpatient care in a hospital, hospice, or residential medical care facility; or
- (B) continuing treatment by a health care provider.

#### Sec. 2612 Leave requirement

##### (a) In general.

- (1) Entitlement to leave. ....an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

...

(C ) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(c ) Unpaid leave permitted. Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave.

(d) Relationship to paid leave.

##### ...

##### (2) Substitution of paid leave.

(A) In general. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), (C) or (E) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection.

(B) Serious Health Condition. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C ) or (D) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection, except that nothing in this title shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

## Sec. 2613 Certification

- (a) In general. An employer may require that a request for leave under subparagraph (C) or (D) of paragraph (1) or paragraph (3) of section 102(a) (29 USCS 2612(a)).....be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee,... The employee shall provide, in a timely manner, a copy of such certification to the employer.
- (b) Sufficient certification. Certification provided under subsection (a) shall be sufficient if it states—
  - (1) The date on which the serious health condition commenced;
  - (2) The probable duration of the condition;
  - (3) The appropriate medical facts within the knowledge of the health care provider regarding the condition;
  - (4) (A) for purposes of leave under section 102(a)(1)(C) (29 USCS 2612(a)(1)(C)), a statement that the eligible employee is needed to care for the son, daughter, spouse, or parent and an estimate of the amount of time that such employee is needed to care for the son, daughter, spouse, or parent

## Sec 2614 Employment and benefits protection

- (a) Restoration to position.
  - (1) In general. Except as provided in subsection (b), any eligible employee who takes leave under section 102 (29 USCS 2612) for the intended purpose of the leave shall be entitled, on return from such leave—
    - (A) To be restored by the employer to the position of employment held by the employee when the leave commenced; or
    - (B) To be restored to an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment.
  - (2) Loss of benefits. The taking of leave under section 102 (29 USCS 2612) shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

Note—clarification and amplification provided this Special Grand Jury by a Department of Labor Investigator included the following:

- 1. An eligible employee may take extended sick leave without formally applying for protection under the Family Medical Leave Act with the approval of their employer. However, the employee would lose the guarantee of the protections given under FMLA.
- 2. The requirement that an employee provide the employer with a medical certification in a “timely manner” may include the employee providing said documentation following the employees return to work.
- 3. If an employee resigns the employee is not entitled to leave under FMLA nor the protections that attach.

## CITY OF PORTSMOUTH ADMINISTRATIVE POLICIES

### ADMINISTRATIVE POLICY #30 – ANNUAL LEAVE

#### Leave Accrual:

For full-time employees, annual leave will be accrued as follows:

1 month – 4 years continuous years of service: 9.4 hours per month.

Annual leave is earned on the first day of the month and is credited in the first pay period of the following month. Employees will receive the balance (taken, earned) of annual leave on each pay stub.

#### Administration:

Leave may be taken after it is earned and approved by the appropriate Department Head, Designee, or Supervisor.

Supervisors are required to report the use of annual leave to City payroll for each pay period to ensure that management and the employee receive an accurate accounting.

#### Carry Over:

An employee may carry over to the next calendar year 352 hours.

#### Termination:

If any employee voluntarily leaves the service of the City after giving at least two weeks notice of his/her intention to do so, the employee will be entitled to annual leave pay equal to the amount of accumulated unused annual leave, or the 352 maximum...whichever is less.

However, if an employee is terminated for cause, or resigns in lieu of termination for cause, he/she will forfeit payment for accumulated annual leave.

### ADMINISTRATIVE POLICY #37 – SICK LEAVE

Purpose: This policy is to provide full-time employees with paid leave during illnesses. Paid sick leave is available to employees for the following reasons:

1. Employee's illness and/or general medical appointments;
2. The birth and care of the employee's newborn child or for the adoption or placement of a foster child with the employee;
3. To care for a spouse, parent, child, or someone in the employee's primary care with a general illness (limited to three days in any one calendar year);
4. To care for a spouse, parent or child with a qualifying (FMLA) serious health condition (does not include in-laws). Child is defined as under 18 years of age unless incapable of self-care because of a mental or physical disability.

These items may also qualify for FMLA leave.

#### Accrual:

Employees will accrue eight hours of paid sick leave for each full calendar month worked.

There is no limit to the amount of sick leave an employee may accumulate.

Unused sick leave will not be paid at the time of termination.

Requesting sick leave:

Employees must obtain supervisor's approval before using sick leave. The supervisor will inform employee of department's call in procedures.

Departments are required to report use of sick leave to the Payroll Department within 30 days of the leave being taken.

ADMINISTRATIVE POLICY #33 – FAMILY AND MEDICAL LEAVE

The City's administrative policy on family and medical leave incorporates and follows the federal law as outlined above, though it expands on procedural requirements in relevant part as follow:

General Eligibility:

...

An employee must use all paid sick leave and annual leave, and may apply for sick leave bank time if eligible, and may apply for the City's Advanced Sick Leave, before requesting unpaid leave.

Requesting FMLA leave:

....

An employee must provide as much advance notice (preferably 30 days) regarding a need for FMLA leave. An employee who requests leave, or any employee with absences of more than three consecutive work days (excluding annual leave) will be asked to complete a Request for Family and Medical Leave form. Depending on the type of leave requested, employees will also be asked to have their health care provider complete a Medical Certification Form. Both the Request for Leave and Medical Certification Form need to be returned within 15 days directly to the City's Health Care Provider. The City's Health Care Provider will not conduct an exam of the patient. They will evaluate the certification form and determine if the leave qualifies as FMLA. **UNDER NO CIRCUMSTANCES SHOULD THE CERTIFICATION OF HEALTH CARE PROVIDER FORM BE TAKEN TO YOUR DEPARTMENT.**

Benefits During Leave:

Employees will retain their group medical care coverage during FMLA leave.

....

Vacation and sick hours, will accrue during any paid leave period.

**FINDINGS OF FACT**

1. Donald Horton was hired as the Fire Chief for the City of Portsmouth by former City Manager Kenneth Chandler effective April 27, 2009. As with all City employees with less than 5 years of service, he earned 8 hours of sick leave per month and 9.4 hours of annual

leave per month during the course of his employment. As with many senior level hires he was credited 5 days of sick leave at the monthly rate (40 hours total) and 10 days of annual leave at the monthly rate (94 hours total) at the start of his employment. As a condition of employment he was also required to establish and maintain residence in the City of Portsmouth. He reported directly to the City Manager and served at the Manager's pleasure.

2. During the week of July 16, 2012, Horton and Chandler had a meeting. During their discussion Horton detailed several personal issues which were weighing heavily on him including the illness of his mother, which had been getting progressively worse. Horton expressed concern over whether he could continue to fulfill his duties as Fire Chief and expressed the need for some time off. Chandler directed Horton to contact Toni Smaw-Bembry, the Director of Human Resources, to explore and initiate the process to take leave under the Family Medical Leave Act (FMLA).
3. Given his position as Fire Chief, Horton was very familiar with the provisions of FMLA and the process of applying for such leave. Although he does not recall whether he had the necessary forms or requested them from Rose McKinney, then Deputy Director of Human Resources, Horton gathered the required paperwork.
4. Following the meeting with Horton in paragraph 2 above, Chandler began discussions with former Deputy Chief Beck Barfield (the Current Fire Chief) about his availability to fill in as Fire Chief on an interim basis.
5. On the morning of Monday July 23, 2012 Horton sent an email to his Administrative Assistant, Daphney Jenkins, advising her that he was taking a day of sick leave and asking that she so advise the City Manager. Ms. Jenkins emailed Chandler advising him of the same. This was the normal process by which Horton would report such an absence.

6. On the morning of Tuesday July 24, 2012, Horton again sent an email to Jenkins advising her that he would be out of the office the remainder of the week on sick leave and to so advise the City Manager. Once again Jenkins sent an email to Chandler to advise him of the same.

7. At 5:28 pm on July 24, 2012 Horton sent an email to Smaw-Bembry (and no others) with the subject line reading "RESIGNATION". The body of the email read:

"Ken Chandler, City Manager, Portsmouth, Virginia. Thank you for the opportunity to serve the City of Portsmouth, Virginia. While I have enjoyed my experience, I have made the personal decision to return to Richmond, Va. I have generally enjoyed working with the entire staff and appreciate the opportunity I have been given. Thanks again and GOD Bless You, your family and the City of Portsmouth, VA."

8. Horton sent Smaw-Bembry 3 emails asking her to call him. The first was 5:18 pm on July 24, 2012, 10 minutes before the email entitled "resignation". The second was at 5:53 pm on July 24, 2012, 25 minutes after the email entitled "resignation". Horton sent a third email from his personal email account on July 27, 2012. Smaw-Bembry acknowledged the first of these emails replying she would contact him, but the two did not speak following any of the emails.

9. Smaw-Bembry testified she advised the City Manager of the email with the "Resignation" subject line. She did not forward the email to him. She testified the City Manager told her that Horton would be coming to see her. Smaw-Bembry also stated that Chandler advised her that Horton would be out on sick leave from July 23<sup>rd</sup> through October 5<sup>th</sup>.

10. Chandler testified that he was not advised of the "resignation" email until much later when responding to a Freedom of Information Act request (FOIA) from the media. He



further testified that he advised Smaw-Bembry that Horton would be coming to see her about taking leave under FMLA.

11. Horton did NOT advise his immediate supervisor, the City Manager Ken Chandler, of an intention to resign either verbally or in writing at any time. Nor did he provide a date the "resignation" was to be effective in his email. Horton testified that when he sent the email entitled "Resignation" to Smaw-Bembry it was not his intention to immediately resign. He explained that had he desired to do so he would have sent the email to Chandler directly with an effective date, as he was well aware as a department head that a resignation should be delivered to an employee's immediate supervisor. He stated that although he hoped to be able to return to the Fire Department, he was unsure if he would be able to, and wanted Ms. Smaw-Bembry to have the email to process in the event he was unable to return. He emailed her several times asking her to call to explain this. However, she did not and his attentions were focused on the matters that necessitated his return to Richmond.

12. The City of Portsmouth utilizes a Personnel Data Transaction Report (PTR) to document any change in an employee's status such as new hire, change in position, change in pay, FMLA absence, or termination of employment (whether by resignation or firing). These forms are to be completed by the employee's department head and forwarded to Human Resources. Once reviewed they are forwarded to Payroll/Data Entry to key in necessary changes to the personnel and payroll records. Copies are maintained in the employee's personnel file.

13. No PTR was generated on Horton to indicate his employment with the City of Portsmouth ended by resignation or otherwise in July of 2012. Nor was one generated to reflect that he was absent on FMLA.

14. On July 25, 2012 Horton sent an email to various employees of the City with whom he worked closely. It read:

“Due to family, I find myself for the first time in a long time putting my priority in order. Life is just too short not to spend as much time with love ones as they grow up and older. I have been so lucky to get to know you and, regardless of what you may believe, you have been an important part of my personal and professional life, I truly have love for you and wish you well. I will stop by Monday morning to bid goodbye, if you are available, but most importantly, GOD BLESS and Shirley and I will miss you. Stay Focus on the Community (PLEASE)”

15. On July 25, 2012 Beck Barfield was hired as the interim Fire Chief for the City of Portsmouth. He remained in that position until made the permanent Fire Chief October 16, 2012.

16. On July 25, 2012 Public Affairs Officer Dana Woodson sent a Staff announcement to various Department Heads that stated Horton had “resigned and returned to Richmond to attend to family medical issues” and that Beck Barfield had returned to the organization to serve as the interim Fire Chief. Chandler was not an addressee in that email.

17. On July 26, 2012 Horton sent an email to Jenkins asking her to advise various professional organizations he had been involved with in connection with his Fire Chief duties of his “resignation from office and their organization”.

18. On July 26, 2012 the Virginian Pilot newspaper ran a heading – “Portsmouth fire chief resigns; interim chief named”. The source of the information as to the resignation is not cited, although subsequent articles state that Chandler advised the Pilot that Horton resigned. This July 26 article states “The City’s fire chief unexpectedly resigned this week after three years on the job.” The following paragraph only attributes Chandler as advising the reporter that “Don Horton decided to return to Richmond because of family medical problems”.

19. On July 31, 2012 Smaw-Bembry sent an email to Payroll Clerk Bonnie Tignor stating that "Chief Don Horton is out on sick leave from July 23 through October 5, 2012." This was to insure that Horton's leave balance was properly debited. Smaw-Bembry testified she was directed to do so by Chandler some time earlier but waited until the close of the pay period. Ms. Tignor was the person Smaw-Bembry typically dealt with in the payroll department. Tignor's initials are on various documents in Horton's file dating back to his initial hire as the payroll clerk/data entry clerk.
20. The City of Portsmouth Payroll Department is responsible for maintaining payroll records of all City of Portsmouth employees. Included within the payroll records are records of accrued and used sick and annual leave for every employee, which are also documented on employee paystubs. Leave accrued is added automatically by the computer system for all employees. Leave taken may be keyed into the system by either a designated departmental employee or the payroll department.
21. Upon receipt of the email noted in paragraph 19 above, Tignor monitored Horton's leave account to verify that information had been keyed into the system each pay period to deduct leave from his outstanding balance and keyed in the entries where necessary.
22. As per normal practice for extended sick leave, Horton's sick leave balance was exhausted first and then deductions were made from his annual leave balance. Horton's leave record from the beginning of his employment in April of 2009 until his final departure in October of 2012 were reviewed by this Special Grand Jury and found to be in proper order.
23. Given the hours of annual and sick leave accrued while employed, less that taken prior to July 23, 2012, Horton had more than sufficient sick and annual leave remaining to cover his

absence from July 23 through October 5 and remain in a paid status. In fact, when he ended his employment in late October of 2012 he had a remaining balance in his annual leave account. He was paid that amount at his hourly rate in accordance with the City's Annual Leave Policy upon leaving the City's employ on October 28, 2012.

24. Horton submitted a request for Family and Medical Leave, which he signed and dated July 23, 2012. In this document he requested FMLA leave from July 23 through October 5, 2012, with the reason checked being "serious health condition of a spouse, parent or child". The form further indicates that a medical certification is required, which should be submitted along with the signed request form to Bon Secours MedCare Center within 15 days. No such 15 day requirement exists under FMLA, which states that the medical certification, if required, shall be provided "in a timely manner".

25. The Medical Certification is a four page U.S. Department of Labor form. Page one is completed by the employee and the remaining 3 pages are completed by the medical provider of the family member of the employee, detailing the nature of the medical condition, specific requirements for care, date the condition commenced and expected duration. Once completed the form is reviewed by Bon Secours MedCare.

26. Bon Secours MedCare is the third-party administrator of FMLA requests for the City of Portsmouth. As such they review the medical certification and documentation to determine whether there is a qualifying event under FMLA. Once reviewed Bon Secours indicates on the Request for Family and Medical Leave Form when the healthcare provider's medical certification was received and whether the condition qualifies for FMLA for the employee and for what period of time. For privacy reasons the medical records, details of who is in

need of care and the doctor's explanation of the nature of the condition are not provided to the City.

27. The U.S. Department of Labor Medical Certification was completed by the pertinent healthcare provider on September 18, 2012 and received by Bon Secours MedCare Center on September 21. Horton indicated he had given the form to the physician to complete sometime prior, but it took the doctor a while to actually complete the certification.
28. Upon review of the request for leave and medical certification, Bon Secours endorsed the request form and indicated that the condition qualified under FMLA for the period of July 23, 2012 through October 5, 2012. The certifying Bon Secours healthcare provider submitted an affidavit to this Special Grand Jury stating that she listed those dates because that was the 12 week period Horton was requesting and the medical certification clearly indicated the condition existed prior to July 23, 2012 and would continue beyond October 5<sup>th</sup>. However, only 12 weeks were allowed under FMLA.
29. This Special Grand Jury received and reviewed not only the Request for Family and Medical Leave Form favorably endorsed by Bon Secours MedCare Center, but also the U.S. Department of Labor Medical Certification Form completed by the treating physician. It is abundantly clear from the Medical Certification that the individual requiring care is a qualified family member of Horton and that the condition is a qualifying serious health condition which existed for the period of time including July 23 through October 5, 2012. The name of the individual requiring care and the particulars of the care required will not be disclosed herein to protect the privacy of Horton's family.
30. The Request for Family and Medical Leave form was signed for as received by the Human Resources Representative for the City on September 27, 2012. Although it should

have been forwarded to the City Manager for signature and endorsement as Horton's supervisor, it was simply marked received and placed in Horton's personnel file. Therefore a PTR documenting his FMLA status was not completed.

31. Also on September 18, 2012, Councilman Bill Moody sent an email to Chandler and all other members of City Council stating he had received word from a former employee that Horton had resigned yet remained on the payroll.

32. On September 20, 2012 the press made the first public report that Horton had left his job as Fire Chief yet remained on the payroll. Smaw-Bembry was quoted as stating that "(W)e got a letter of resignation" with no further explanation of the sick leave email she forwarded to Tignor nor any mention of Horton's leave status. Chandler reportedly stated Horton was on leave under the Family Medical Leave Act and declined to speak to Smaw-Bembry's comments regarding the resignation email.

33. In early October 2012, Horton and Chandler spoke about Horton returning to work. Horton expressed concerns as the Fire Chief position required Horton to live within the limits of the City of Portsmouth, and he did not feel able to do so any longer. Horton inquired as to whether he could serve the City in some other capacity given his training and experience. Chandler indicated that one of the Deputy Fire Chief positions was vacant and another was about to be vacated due to the pending retirement of Deputy Fire Chief Troy Tilley. One of those positions included the emergency management responsibilities, which was offered to Horton with the working title of Deputy Director of Emergency Management. While that position had some traditional emergency management responsibilities, it primarily dealt with community outreach and proactive public awareness programs and planning. The reactive responsibilities involved with dealing with an actual emergency would fall to the City

Manager himself and Fire Chief. Horton returned to work in this capacity in October of 2012.

34. With Horton's return to work, press inquiries increased as to his status during the preceding months and his return to a new position. Chandler declined to respond to the inquiries of the press and City Council other than to say Horton had been on Family Leave and upon his return was named to his new position.
35. Chandler was criticized for his lack of explanation and subsequently resigned as City Manager.
36. Horton grew weary of the continuing attention and resigned his position effective October 28, 2012. His resignation was by way of email sent to his direct supervisor, Fire Chief Beck Barfield, who then prepared the necessary PTR to document the termination of employment and the pay sheet to request Horton be paid for the balance of his annual leave per city policy.

### CONCLUSIONS

1. Based upon the evidence submitted, the Special Grand Jury unanimously finds that no criminal laws or statutes have been broken. Therefore, the Special Grand Jury directs the Commonwealth's Attorney not to file criminal indictments against any persons.
2. As to former Fire Chief Donald Horton's status during the time period in question, the evidence is in conflict as to his intent. In addition to his testimony, certain evidence presented points to the conclusion that he did not intend to resign. His conversation with Chandler the week prior about taking family leave, his emails to his assistant advising her he would be on sick leave the week of July 23<sup>rd</sup>, the fact that his "resignation" email was sent to Smaw-Bembry versus Chandler (coupled with multiple requests for Smaw-Bembry to

contact him) and contained no effective date, and the fact that he did submit the required FMLA paperwork suggest that his intention was to be on leave. Additionally, Horton knew how to apply for leave under FMLA and eventually did so. Although the City Policy states the Request for Leave and Medical Certification "need to be returned within 15 days", this is contrary to the Family and Medical Leave Act itself, which imposes no such time restriction.

However, FMLA cannot be requested after a valid resignation, as resignation divests the employee of any entitlement under FMLA. The resignation was clearly not effected in that neither Chandler nor anyone else ever processed it by way of a PTR or any other form. To the contrary, Chandler directed Smaw-Bembry to put Horton on a leave status. He would have no basis for doing so other than pursuant to a request from Horton himself.

Despite this, if it was Horton's intention to resign when he sent the email to Smaw-Bembry, it would arguably terminate his employment regardless of whether Chandler and/or Smaw-Bembry properly affected it as the employer. Just as some evidence suggests an intent to be on leave, other evidence suggests an intent to resign. The language in the "resignation" email sent to Smaw-Bembry on July 24<sup>th</sup>, the subsequent email to his co-workers thanking them and wishing them well, and the email to his administrative assistant asking her to advise various local organizations of his resignation clearly suggest the intent to resign.

These cannot be logically reconciled without looking behind them. In this regard this Special Grand Jury found the testimony of Horton very compelling. He was going through an extremely difficult time and was faced with numerous hardships, more than one of which may very well have met the standard for a qualifying event under FMLA. To describe his turmoil he used such phrases as "devastating", "in a state of depression", "I didn't know whether I was coming or going" and "strongly focused on my mother". His heartfelt



testimony made it clear that he had been distraught and his focus and attention were on his family at the time of his departure.

This should not be surprising as that is the inherent purpose behind FMLA – the ability to focus on the health and well being of one's family when necessary for an extended period of time while being assured that one's livelihood will be protected. The conflicting information that was being disseminated at the time only serves to confirm that Horton's future with the City was uncertain at the time of his departure. However, whether he intended to return, intended not to return or, as the Special Grand Jury believes, was uncertain as to whether he would be able to return, one thing is clear. That is, while leave instructions were disseminated and processed, no resignation paperwork was generated. Given the conflicting information that existed at the time, had resignation paperwork been processed in July of 2012 and Horton's pay stopped, what would have resulted would have been not only a travesty, but also likely a violation of the protections of the Family Medical Leave Act.

3. All that being said, the confusion that ensued could have easily been avoided had the City Manager, Fire Chief and Director of Human Resources better communicated and documented what was occurring. Toni Smaw-Bembry held in her hands two conflicting documents – one entitled "resignation" from Horton and another placing Horton on leave from July 23<sup>rd</sup> through October 5<sup>th</sup> which she drafted at the direction of the City Manager. She did not receive a PTR documenting either event. Her testimony was that she assumed that the resignation was invalid as she never received a PTR from Chandler terminating Horton's employment by resignation. However, she never received a PTR from Chandler to change Horton's status to being out on FMLA either. If she was unsure if Horton had resigned or was on leave, she should have contacted the City Manager for direction. Instead,

she did not clarify the situation with Chandler or request the appropriate PTR because in her words "that is the City Manager's job and he knew what to do". As the Director of Human Resources it was incumbent upon her to insure the appropriate documentation was received, processed and filed. A simple email or phone call to either Chandler or Horton would have easily clarified Horton's status, prompted preparation of the appropriate paperwork and prevented the ensuing uproar.

4. Likewise, former City Manager Chandler's inaction is perplexing. He remains steadfast in his assertion that he knew nothing of any "resignation" until quite some time later following a FOIA request. Yet initial accounts in the media and emails from Chandler's own Public Affairs Officer Dana Woodson stated that Horton "resigned". Chandler maintains he never saw that email. Although this is possible as he was not one of the addressees, it is difficult to understand how Chandler could have been unaware of what appears to have been a widespread belief that Horton had resigned. Additionally, from his comments that Horton had "returned to Richmond due to family medical issues" and his hiring of Beck Barfield as the interim Fire Chief understandably left others with the impression that Horton would not be returning. Had this been made clearer at the outset by referring to his absence as temporary or pursuant to the FMLA, much of this could have been avoided.

What is most baffling is his failure to publicly address and reconcile Horton's leave status with the July 24 "resignation" email, once the latter came to light. Had he done so, much of the ensuing speculation and frenzy could have been avoided. The City Manager is hired by and reports to City Council and serves at their pleasure. However, by City Charter, the authority to hire, reassign and manage employees of the City is his and his alone, unless further delegated by him. Because of this Charter provision, as a general rule personnel

matters of the City Manager are generally beyond the purview of City Council. However, this situation had escalated beyond a typical personnel matter to one fraught with allegations of a cover-up of improper payments to the former Fire Chief. Although it would have been improper for Chandler to divulge the details of the specific problems facing Horton and his family which necessitated his return to Richmond, as City Manager it was incumbent upon him to respond to the allegations and explain how Horton could be in a paid family leave status given the "resignation" email. This failing is contrary to the ideals of transparency in government and, as happens far too often, results in public mistrust and unfair accusations. In the end, City Council lost confidence in Chandler, who resigned, and unwarranted speculation and criticism of Horton continued, prompting him to also resign rather than endure further attacks.